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No. 94-396

In the Supreme Court of the United States

OCTOBER TERM, 1994

RAYMOND WIZBOWSKI AND BARBARA WIZBOWSKI,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner established that the final decision of the Tax Court was procured by fraud upon the court and should therefore be vacated.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is unpublished, but the decision is noted at 12 F.3d 1111. The order of the Tax Court (Pet. App. 5-8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1993. The petition for rehearing was denied on May 3, 1994. Pet. App. 9. The petition for a writ of certiorari was filed on August 1, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985, the Tax Court concluded that petitioners (and other similarly situated taxpayers in a consolidated case) were not entitled to the loss deductions they had claimed for 1977 and 1978 from their investment in a partnership. The court disallowed the deductions because the partnership's alleged purchase of a mobile home park was a sham transaction. *Steinert* v. *Commissioner*, 1985 Tax Ct. Mem. Dec. (P-H) ¶ 85,581, at 85-2601 to 85-2602. In 1986, the court entered its final order determining deficiencies in petitioners' federal income taxes of $28,854 for 1977 and $28,113 for 1978. Pet. App. 5.

In 1991, petitioners moved the Tax Court to vacate its 1986 decision. Petitioners asserted that the attorney who represented them in the Tax Court proceedings—T. Dean Hawkins (who previously had been an employee of the Internal Revenue Service)—had an offer to resume employment with the Service at the time he represented petitioners (Pet. App. 3, 6; CR 17, at 1-2).[1] Petitioners asserted that this alleged, undisclosed conflict represented a fraud on the court.

Petitioners also complained about the fact that Hawkins had cooperated in trying the Tax Court case with Thomas Harris, who was the organizer and promoter of the several partnerships and who represented the other taxpayers in the consolidated case. Peti-

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[1] Petitioners acknowledged that, as early as June of 1988, they were aware that Hawkins had returned to work for the IRS (CR 17, at 14).

"CR" references are to the docket control numbers assigned to the documents comprising the original record by the Clerk of the Tax Court. "RT" references are to the reporter's transcript of proceedings before the Tax Court on March 17, 1992.

tioners claimed that Harris had a conflict of interest in representing the taxpayers at trial in 1985 because a judgment favorable to the government might enhance Harris's personal tax position. See Pet. (14-15). Petitioners asserted that this alleged conflict also represented a fraud upon the court that would justify vacation of the 1986 Tax Court decision (CR 17, at 2, 5).

2. The Tax Court held an evidentiary hearing on the motion to vacate (Pet. App. 5). Hawkins testified that, when he left the Internal Revenue Service in 1981 to open a law practice, he had no assurance or understanding, and little expectation, of any future employment with the Service (RT 10, 12, 16). Larry Boehm, Hawkins's supervisor at the time of his departure, testified that he had never promised future employment to Hawkins or anyone else departing the IRS (RT 82) and had no authority to make such an offer (RT 83). Robert Ray, who contacted Hawkins in mid-1987 about the job that Hawkins ultimately accepted with the Service, testified that he knew of no outstanding agreement between Hawkins and the IRS regarding reemployment (RT 92, 93).

The Tax Court denied the motion to vacate (Pet. App. 5-8). The court concluded that "[t]here is no evidence * * * that Hawkins actually had an outstanding offer of employment from the Internal Revenue Service at the time he represented petitioners in this case, and the preponderance of the evidence negates such an outstanding offer" (*id.* at 6). The court further found that "[t]here is no evidence that Hawkins' expectations about future reemployment by the Internal Revenue Service affected his performance on behalf of petitioners" (*ibid.*) or that respondent's counsel "was aware of Hawkins' expectations or that respondent

received any advantage in this case as a result of Hawkins' expectations" (*ibid.*).

The court noted that "[a] lawyer's inadequate or improper representation of his own client is not a fraud on the Court and does not justify setting aside a final decision" (Pet. App. 6-7). The court further stated that, in any event, "we do not believe that petitioners would be able to secure any different or other result in this case if our prior decision were vacated" (*id.* at 7). The court denied the motion to vacate, concluding that "[i]t would be unfair to respondent, to the Court, and to other taxpayers to reopen this case" (*ibid.*).

3. The court of appeals affirmed (Pet. App. 1-4). The court concluded that petitioners had "fail[ed] to demonstrate that the 1986 Decision was procured through a fraud upon the court" (*id.* at 2). The court explained that petitioners' "claim that their attorney represented them under a conflict of interest does not allege a fraud upon the court" (*id.* at 3, 4 (citing, *e.g.*, *Anderson* v. *Commissioner*, 693 F.2d 844, 846 (9th Cir. 1979); *Kenner* v. *Commissioner*, 387 F.2d 689, 692 (7th Cir.), cert. denied, 393 U.S. 841 (1968)).

The court noted, moreover, that petitioners' claim of fraud lacked an adequate evidentiary basis. It was undisputed that Hawkins had little expectation of returning to work at the IRS and that he had received no offer or promise of employment at the time he represented petitioners (Pet. App. 3-4). The court of appeals concluded that the Tax Court did not err in rejecting petitioners' claim, which rested upon "little more than pure speculation" (*id.* at 4).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other

court of appeals. Further review is therefore not warranted.

1. The Tax Court is not a court of plenary jurisdiction. It has only such jurisdiction as is conferred upon it by the Internal Revenue Code. See *Commissioner* v. *McCoy*, 484 U.S. 3, 7 (1987) (per curiam); *Commissioner* v. *Gooch Milling & Elevator Co.*, 320 U.S. 418, 422 (1943). Under 26 U.S.C. 7481, a Tax Court decision becomes final when it is no longer subject to direct review. *Kenner* v. *Commissioner*, 387 F.2d 689, 690 & n.4 (7th Cir.), cert. denied, 393 U.S. 841 (1968). Once a decision of the Tax Court has become final, neither the Tax Court nor any other court has jurisdiction to reconsider it. *Lasky* v. *Commissioner*, 352 U.S. 1027 (1957) (per curiam), aff'g 235 F.2d 97 (9th Cir. 1956); *R. Simpson & Co.* v. *Commissioner*, 321 U.S. 225 (1944); *Helvering* v. *Northern Coal Co.*, 293 U.S. 191 (1934).

An exception to this finality rule has been recognized by the courts of appeals: the Tax Court may vacate or reopen a decision that has become final if the decision resulted from fraud upon the court. See Pet. App. 2; *Billingsley* v. *Commissioner*, 868 F.2d 1081, 1084 (9th Cir. 1989); *Abatti* v. *Commissioner*, 859 F.2d 115, 119 (9th Cir. 1988). Fraud upon the court occurs when the decision is the result of a corrupt scheme that undermines the integrity of the judicial process and vitiates the court's ability to reach an impartial disposition of the case before it. See *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 246, 250 (1944).

Under this standard, the courts have consistently held that a claim that a party's attorney acted under a conflict of interest does not suffice to establish a fraud upon the court. See *Heim* v. *Commissioner*, 872 F.2d 245, 249 (8th Cir. 1989); *Flood* v. *Commissioner*, 468 F.2d 904 (9th Cir.

1972), cert. denied, 411 U.S. 906 (1973); *Kenner* v. *Commissioner*, 387 F.2d at 692; *Chao* v. *Commissioner*, 92 T.C. 1141, 1143 (1989).[2] There is thus no conflict among the courts of appeals on the legal question presented and decided in this case.[3]

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[2] Contrary to petitioners' suggestion (Pet. 10), the decision of the court of appeals in this case does not conflict with *Alexander* v. *Robertson*, 882 F.2d 421 (9th Cir. 1989). In *Alexander*, a party sought relief from an adverse judgment after discovering that his opponent's counsel was not a licensed attorney. The court rejected that application, concluding that fraud upon the court requires proof of a plan "designed to improperly influence the court in its decision." *Id.* at 425. The court of appeals similarly concluded in the present case that petitioners had failed to establish the existence of any plan or scheme to defraud the court (Pet. App. 4).

[3] Petitioners err in relying (Pet. 16-18) on two decisions in which fraud upon the court was found *not* to have occurred. In *Bulloch* v. *United States*, 763 F.2d 1115 (10th Cir. 1985), cert. denied, 474 U.S. 1086 (1986) (Pet. 16-17), the plaintiffs sought to reopen a final judgment by alleging that the government had presented misleading evidence and had pressured witnesses to alter their testimony. The court rejected the plaintiffs' request, reasoning that plaintiffs had "tried their case on the basis of their then best judgment" (763 F.2d. at 1119) and that, in any event, fraud upon the court does not result from "fraud between the parties or fraudulent documents, false statements or perjury" (*id.* at 1121). Similarly, in *Kupferman* v. *Consolidated Research & Mfg. Corp.*, 459 F.2d 1072 (2d Cir. 1972), the court refused to vacate a final judgment awarding damages when it subsequently came to light that the plaintiff's attorney had known at the time of the proceedings, but had failed to disclose, that the plaintiff had executed a release in the defendant's favor that would have served as a complete defense to the action. The court concluded that "it would be going too far to characterize as 'fraud upon the court' his failure to disclose an instrument which he could have supposed reasonably—although, as it now appears, erroneously—to have been known to his adversary." *Id.* at 1081.

2. a. Petitioners' general allegations of fraud upon the court were also properly rejected by the courts below. The evidence at the Tax Court hearing on petitioners' motion to vacate revealed nothing suggesting that deceit or collusion had lessened the integrity of the judicial process. The premise of the motion to vacate was that Hawkins—petitioners' former attorney—had a conflict of interest because he represented petitioners while he assertedly had an outstanding offer of employment from the Internal Revenue Service. After hearing the evidence, however, the Tax Court concluded that no such offer of employment existed (Pet. App. 6). The court of appeals agreed, noting that petitioners' assertions to the contrary consisted of "little more than pure speculation" (*id.* at 4). Moreover, petitioners did not establish that they received inadequate representation at the Tax Court trial in the consolidated case or that any additional or different presentation of evidence at that trial would have altered the result (*id.* at 7-8).

b. Petitioners further contend that Harris—who organized the partnerships whose deductions were at issue—should not have been permitted to represent the taxpayers at the Tax Court trial. They claim that Harris had a conflict of interest because a decision adverse to the taxpayers might have benefitted him personally (Pet. 14-15). Petitioners assert that Harris's joint representation with Hawkins at the consolidated trial therefore represented a fraud upon the court.

Even if Harris had a conflict of interest, his representation of petitioners would not constitute a fraud upon the court. See *Kenner* v. *Commissioner*, 387 F.2d at 692; *Chao* v. *Commissioner*, 92 T.C. at 1143. Moreover, in this case, while Harris may have taken the lead in advocating the allowability of the deductions,

petitioners were separately represented by Hawkins, the counsel of their choice. As petitioners acknowledged in their motion to vacate (CR 17, at 2-3, 13), Harris was representing the other taxpayers; Hawkins represented petitioners (*id.* at 1; see Pet. App. 6).[4]

Moreover, contrary to petitioners' assertion (Pet. 14-15), the economic interests of petitioners and Harris were not inherently distinct. A successful defense by Harris of petitioners' claimed deductions would benefit Harris by eliminating any potential personal liability he might have to the investors who entered the partnerships upon his advice. See RT 99. Petitioners' allegations of a conflict of interest are, in any event, ultimately insufficient because, as the Tax Court stated, there is no basis to "believe that petitioners would [have been] able to secure any different or other result in this case if [its] prior decision were vacated" (Pet. App. 7).[5]

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[4] Tax Court Rule 24(f) provides that, if counsel of record was involved in planning or promoting a transaction or operating an entity connected to any issue in a case, he must either secure the client's informed consent to his representation or withdraw from representation. As the Tax Court noted at the close of the evidentiary hearing (RT 97), that Rule has no bearing in this case because petitioners were not Harris's clients and because the Rule was not adopted until after the trial in this case.

[5] *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, *supra*, on which petitioners rely (Pet. 17), is inapposite. In that patent case, it was discovered after the decision became final that the result had been procured by use of a bogus scientific article that had been published specifically for the purpose of influencing the outcome of the case. Because the court of appeals had been duped by the hoax, this Court set aside the judgment. 322 U.S. at 246. In the present case, by contrast, petitioner has not demonstrated that any false evidence was submitted at the original trial or that a new trial could lead to a different result (Pet. App. 7).

The courts below thus had an adequate evidentiary basis to conclude that the Tax Court's 1986 decision had not been procured by fraud. Further review of that fact-bound conclusion is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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